85-1389

Supreme Court, U.S.
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No. .....

In The

Supreme Court of the United States

October Term, 1985

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MIER COHEN and EREZ ATAVA,

Petitioners,

vs.

STATE OF NEW MEXICO,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

—o—

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the New Mexico Supreme Court erred when it decided, in conflict with *Reid v. Georgia*, 448 U.S. 438 (1980), and other controlling precedents of this Court, that the petitioners' detention, based solely on a few factors of a "drug courier profile" was based on reasonable suspicion that these petitioners were transporting drugs.

2. Whether the New Mexico Supreme Court erred when it decided, in conflict with *Florida v. Royer*, 460 U.S. 491 (1983), and other controlling precedents of this Court, that a finding of a voluntary consent to search obtained during an unlawful detention made it unnecessary to determine if the resulting search was a fruit of the unlawful detention.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Petitioners Mier Cohen and Erez Atava petition the United States Supreme Court for a writ of certiorari to review the order of the New Mexico Supreme Court entered on December 9, 1985, and made final by judgment entered on December 27, 1985.

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OPINIONS BELOW

The opinion of the New Mexico Supreme Court, reported at 25 N.M.B.Bull. 34 (1986), is reproduced at pages 20-33 of the Appendix to this petition. The opinion of the New Mexico Court of Appeals, reported at 25 N.M.B.Bull. 40 (Ct. App. 1986), is reproduced at pages 5-19 of the Appendix to this petition. The letter opinion and order from the district court reproduced at pages 2-5 of the Appendix, are not reported.

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JURISDICTION

The New Mexico Supreme Court issued its opinion and order respecting the questions presented on December 9, 1985, and that order was made final by judgment entered on December 27, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

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CONSTITUTIONAL PROVISION INVOLVED

This petition involves consideration of the fourth amendment to the United States Constitution: "The right

of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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STATEMENT OF THE CASE

On January 5, 1984, Officer Summers was on radar patrol duty on Interstate Highway 40 (I-40) near Albuquerque, New Mexico.[1] A few weeks earlier, the officer had attended a seminar on narcotics transportation on I-40, at which time he had been told by other officers that there was something called a "drug courier profile." Officer Summers testified that he was told that the profile as it applied to vehicles on I-40 included the following characteristics:

(1) Florida license plates;

(2) Rental cars;

(3) Occupants, usually two, who appear to be foreigners, usually of Latin descent;

(4) Very little luggage for a cross-country trip;

(5) A destination of Los Angeles. App. at 6 (Ct. App.). Until the day Summers arrested the petitioners

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[1] The factual record in this case consists of the testimony of New Mexico State Police officers Summers and Velarde at the hearing on petitioners' motion to suppress evidence.

he had no previous experience with drug cases. This was his first profile stop. Record, T. 2, 2-20-84, 286.

At approximately 5:07 p.m., Summers' radar showed the petitioners' vehicle going 61 miles per hour in a 55 mile per hour zone. After the petitioners passed the police car, but before the officer began to follow them, Summers noticed that the petitioners' car had Florida license plates and that there were two men inside the car. Summers engaged his emergency equipment and pulled over the petitioners' car. At that time he noticed a sticker on the car indicating that the vehicle was rented. He could also see new clothes and two suitcases in the hatchback area of the car. App. at 6 (Ct. App.).

Summers requested and received identification from the driver, Mier Cohen, and the passenger, Erez Atava. Based on the petitioners' names, Summers believed them to be foreigners. Record, T. 2, 2-20-84, 392. Summers also received the rental contract for the car, which stated that petitioner Cohen had rented the car and identified both men as drivers. App. at 6 (Ct. App.). The rental contract further indicated that the car was pre-paid in cash and was en route from Florida to Los Angeles, California. App. at 6, 7 (Ct. App.).

Summers kept all of the above identification papers and told the petitioners that Cohen would be issued a citation for speeding. He also told the petitioners he wanted to run an NCIC check on them and on the car. The petitioners remained in their car and Summers went back to his car. Some time passed, during which Summers saw the petitioners conversing and looking back at him. After a while Cohen got out of the car and began walking back

to the police car. Summers got out of his car and met him between the cars. Summers testified that he thought it was unusual that Cohen would get out of the car to find out what was taking so long because it was a cold, windy day. Summers also testified that he thought Cohen was more nervous than a normal person waiting to have a ticket issued. Summers instructed Cohen that he had not yet received a reply and told Cohen to go back and wait in his vehicle because it was cold outside. App. at 7 (Ct. App.).

After Summers went back to the police car, he requested assistance from the narcotics division of the police department. Before that assistance arrived, however, Summers received negative replies from NCIC to all of his inquiries concerning the petitioners and the vehicle. App. at 7 (Ct. App.).

Instead of issuing the citation, however, Summers waited for the narcotics officers to arrive, during which time he prepared a consent to search form. Two narcotics officers, Velarde and Marino, arrived and talked with Summers. All three officers then approached the petitioners' car. Velarde took Atava back to the police vehicle while Summers and Moreno approached Cohen, handed him the consent form and asked him to get out of the car. The officers read Cohen his *Miranda* rights and he said that he understood them. Cohen told the officers that they could search the vehicle and signed the consent form. App. at 7 (Ct. App.). The officers then drove the vehicles and the petitioners a few miles from the highway to a service station where they performed the search. App. at 8 (Ct. App.).

The officers took apart an extra spare time in the trunk of the car during the search and seized 11 pounds

of cocaine. They first observed the tire at 5:40 or 5:45 p.m. Approximately 40 minutes had elapsed between the initial stop of the petitioners for speeding and the seizure of the cocaine, 15 or 20 minutes of which was the time between the negative response from NCIC and the signing of the consent to search form.[2] Summers further testified that the petitioners were not free to leave at any time after he stopped them. App. at 8 (Ct. App.).

The federal questions presented here were first raised to the district court through petitioners' motions to suppress physical evidence. After an evidentiary hearing, the trial court issued an opinion and order granting the motion to suppress evidence. The state appealed that order to the New Mexico Court of Appeals, which affirmed the district court. The state then petitioned for a writ of certiorari to the New Mexico Supreme Court. That court granted the writ and reversed the court of appeals and the district court as to the issues presented here. The opinion and judgment of the New Mexico Supreme Court was made final by an order entered by that court on December 27, 1985. The opinion and judgment of the New

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[2] The New Mexico Supreme Court in its rendition of the facts, says that the time between the NCIC response and the signing of the consent to search form was between 3 and 13 minutes, App. at 24 (S. Ct.), and that Summers testified the tire was found at about 5:35 and Marino testified the tire was found at about 5:25, App. at 32 (S. Ct.). There is no support in the record for these statements by the New Mexico Supreme Court. Summers testified that he first observed the tire at "about 5:45-5:40, somewhere around in there." Record, T. 3, 2-20-84, 200. Based on this record, the New Mexico Court of Appeals decided that 15 to 20 minutes elapsed between the negative NCIC response and the signing of the consent to search form. App. at 8 (Ct. App.). Marino did not even testify at the hearing.

Mexico Supreme Court is in conflict with decisions of this Court, decisions of numerous federal appellate courts, and decisions of other state courts.

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REASONS FOR GRANTING THE WRIT

THE NEW MEXICO SUPREME COURT'S RESOLUTION OF THE FOURTH AMENDMENT QUESTIONS PRESENTED IS IN DIRECT CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT, AND WITH DECISIONS OF FEDERAL APPELLATE COURTS AND THE HIGHEST COURTS OF OTHER STATES

I. Whether The New Mexico Supreme Court Erred When It Decided, In Conflict With Reid v. Georgia, 448 U.S. 438 (1980), And Other Controlling Precedents Of This Court, That The Petitioners' Detention, Based Solely On A Few Factors Of A "Drug Courier Profile" Was Based On Reasonable Suspicion That These Petitioners Were Transporting Drugs

This case is virtually indistinguishable from *Reid v. Georgia*, 448 U.S. 438 (1980). In *Reid* this Court held that a drug courier profile was nothing more than "a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics," *id.* at 440-1, and established the principle that similarities between a suspect and a "drug courier profile" are insufficient to establish the requisite reasonable and articulable

suspicion to support even a limited seizure under *Terry v. Ohio*, 392 U.S. 1 (1968).

These petitioners were detained and their property seized solely on the basis of a few drug courier profile factors. An analysis of the profile factors the police officer relied on in this case shows that they supplied no "reasonable and articulable suspicion" of these petitioners which would justify detaining them once the NCIC check was complete. Nothing set them apart from the thousands of travelers on the interstate highway who are stopped, issued speeding citations, routinely checked through the National Crime Information Center and sent on their way.

The first two profile factors on which the officer relied in this case are exactly the same factors that this Court held in *Reid* could not, as a matter of law, support a finding of reasonable suspicion. The first factor present here and condemned in *Reid* was that petitioners were "driving a rental car with Florida license plates," App. at 22 (S. Ct.), on the theory that Florida is "an area suspected by authorities to be a point of origin in drug shipments." App. at 26 (S. Ct.).[3] The second factor present here and con-

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[3] Although Florida is undoubtedly a major drug distribution center, so is New York, *United States v. Gooding*, 695 F.2d 78 (4th Cir. 1982); San Francisco, California, *United States v. Allen*, 644 F.2d 749 (9th Cir. 1980); and Los Angeles, California, *United States v. Andrews*, 600 F.2d 563 (6th Cir.), *cert. denied, sub nom Brooks v. United States*, 444 U.S. 878 (1979). In fact, as the court in *Andrews* observed: "our experience with DEA agent testimony in other cases makes us wonder whether there exists any city in the country which a DEA agent will not characterize as a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center." *Id.* at 566-67.

demned in *Reid* was that the petitioners had only "a small amount of luggage." App. at 22 (S. Ct.).[4]

The third profile factor on which the officer relied was that the car contained two persons who "appeared to be foreigners." App. at 26 (S. Ct.). The officer testified that he thought the names on petitioners' drivers licenses were foreign names. Record, T. 2, 2-20-84, 392. Basing suspicion on a name, however, is not only unreasonable, it is absurd. In a nation of immigrants, could the law justify different treatment of a person based on a "foreign" name? We all have names that are foreign in origin.[5]

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[4] Officer Summers testified that he could see two suitcases and additional clothing in the back of the car through the rear window of the hatchback. Record, T. 3, 2-20-84, 109-112. The court of appeals held that this testimony failed to establish that this factor of a profile had been met, App. at 6 (Ct.App.), whereas the New Mexico Supreme Court agreed with the officer that two people driving across country with two suitcases and additional clothing did not have "much luggage for a cross-country trip." App. at 2 (S. Ct.). The vagueness of this factor is apparent from the differing analyses of the officer's testimony in these two courts. If a factor can be interpreted this broadly, it is obviously meaningless.

[5] In truth, however, it was probably not just their names that made the officer suspect these petitioners, but also their dark skin:

> Prosecutor: [C]ould you tell us what knowledge you have, if any, of a drug courier profile with reference to cocaine smuggling.
>
> * * *
>
> Officer: Well, mostly they're of a Latin descent, Colombia and Cuba.

Record, T. 4, 2-20-84, 221-22. These petitioners were neither Colombian nor Cuban, although they probably looked "Latin". *But see, United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975), where this Court noted that "[l]arge numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, . . .".

By its decision, the New Mexico Supreme Court has authorized police officers in New Mexico to apply different fourth amendment standards to different ethnic groups, particularly when they are interstate travelers.

The next profile factor the officer relied on was driving "across the country." App. at 22 (S. Ct.). It is difficult, however, to imagine how driving across the country is suspicious, especially on Interstate 40, the modern replacement for Route 66, fabled in song and story as the main thoroughfare for travelers between the East coast and the West coast. Drug couriers are not the only people using the interstate highways to travel across the country.

The officer also relied on the factor that the petitioners were driving "a one-way car rental being paid for in cash." App. at 2 (S. Ct.).[6] This factor, however, has appeared in numerous federal and state cases involving a drug courier profile and has been almost uniformly discredited. *See e.g., United States v. Saperstein*, 723 F.2d 1221 (6th Cir. 1983); *United States v. Berryman*, 717 F.2d 650 (1st Cir.), *cert. denied*, 465 U.S. 1100, *reh'g denied*, 104 S. Ct. 2376 (1984); *State v. Shy*, 373 So.2d 145 (La. 1979).

The last factor, that the petitioners "appeared nervous," App. at 26 (S. Ct.), does not add any support to the court's position.[7] Although both the officer and the New

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[6] If paying in cash has any significance it would be to protect the anonymity of the rentor. That can have no bearing here where both petitioners' names appeared on the rental contract.

[7] The officer testified that Cohen seemed "[a] little apprehensive," and acted "a little more nervous than the normal person that I issue a traffic citation to for speeding." Record, T. 2, 2-20-84, 481-87.

Mexico Supreme Court considered nervousness to be somehow unique to these petitioners, nervousness is almost always listed as one of the factors of profiles held to be insufficient to support a detention. *See, e.g., United States v. Gooding*, 695 F.2d 78 (4th Cir. 1982); *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980), *appeal after remand*, 690 F.2d 869 (11th Cir. 1982); *United States v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980); *People v. Steckhan*, 116 Ill.App.3d 173, 452 N.E.2d 122 (Ct. App. 1983); *State v. Cooke*, 54 N.C.App. 33, 282 S.E.2d 800 (N.C. App. 1981), *aff'd*, 306 N.C. 132, 291 S.E.2d 618 (1982); *State v. Shy*, 373 So.2d 145 (La. 1979). Furthermore, "[i]nnocent travelers may be apprehensive when told by narcotics officers that they are suspected traffickers." *United States v. Allen*, 644 F.2d 749, 752 (9th Cir. 1980).[8]

The only facts the New Mexico Supreme Court relied on to justify the petitioners' seizure were factors of a drug courier profile the police officer had been told about at his training session. Every one of these so-called profile factors, either alone or together, apply to "a very large category of presumably innocent travelers" on the interstate highway. *Reid v. Georgia*, 448 U.S. at 441. The rule laid down by this Court in *Reid* unequivocally applies in this case. The officer had not one iota of suspicious information nor did he see any suspicious activity regarding *these* petitioners. The petitioners had rented the car using their own names, they carried valid identification, they

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[8] At the suppression hearing in this case, Judge Martinez made the following observation to counsel for the state during her closing argument: "A profile is simply when an officer's hunch is reduced to a procedure and passed along. Can't it be adapted if there is any situation? You're nervous now, what have you done wrong?" Record, T. 1, 2-21-84, 358-61.

waited for the officer to tell them what to do and an NCIC check of the petitioners and the rental car was negative. The actions of these petitioners failed to arouse any reasonable suspicion. The New Mexico Supreme Court erred in refusing to follow *Reid* and in finding reasonable suspicion based on these meaningless factors.

Rather than relying on *Reid*, the New Mexico Supreme Court relied instead on *United States v. Sharpe*, 105 S. Ct. 1568 (1985). This reliance, however, is totally misplaced. The issue in *Sharpe* was whether an individual *reasonably suspected* of engaging in criminal activity may be detained for a period of 20 minutes. *Id.* at 1574. The issue in this case is whether reasonable suspicion exists in the first place and ***not*** what period of time a suspect may be held once a showing of reasonable suspicion has been made. An individual "may not be detained even momentarily without reasonable, objective grounds for doing so, ..." *Florida v. Royer*, 460 U.S. 491, 498 (1982). The suspicion must exist first—and must be reasonable.

The majority of federal appellate courts in this country have ruled that a drug courier profile, even with the added "factor" of nervousness, does not provide reasonable suspicion for a detention. The factors vary from city to city and state to state, depending on whether they are applied at an airport or on the highway[9] and are often con-

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[9] Most of the drug courier profile cases have involved arrests at airports. A detailed list of both primary and secondary factors found in the cases and a discussion of the variances in the characteristics can be found in *United States v. Berry*, 670 F.2d 583, 598-99, n.17 (5th Cir. 1982).

tradictory.[10] "One problem with determining the propriety of the stop solely on the basis of whether or not the defendant met the profile is that the factors present in the profile seem to vary from case to case. The Special Agent . . . himself testified that the profile in a particular case consists of anything that arouses his suspicion." *United States v. Chamblis*, 425 F.Supp. 1330, 1333 (E.D. Mich. 1977).

The New Mexico Supreme Court decision is in conflict with these federal cases. The factors discussed by the federal courts, even though they vary widely from case to case, include most of the factors relied upon by the court below. In each case, the court found that the profile factors did not provide reasonable suspicion. *See e.g., United States v. Berryman*, 717 F.2d 650 (1st Cir.), *cert. denied*, 465 U.S. 1100, *reh'g denied*, 104 S. Ct. 2376 (1984); *United States v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980); *United States v. Gooding*, 695 F.2d 78 (4th Cir. 1982); *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980), *appeal after remand*, 690 F.2d 869 (11th Cir. 1982); *United States v. Saperstein*, 723 F.2d 1221 (6th Cir. 1983); *Moya v. United States*, 761 F.2d 322 (7th Cir. 1985); *United States v. Belcher*, 685 F.2d 289 (9th Cir. 1982) (Norris, J., concurring); *United States v. Puglisi*, 723 F.2d 779 (11th Cir. 1984).

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[10] Compare, *United States v. Jefferson*, 650 F.2d 854 (6th Cir. 1981) (profile includes walking quickly through an airport), with *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980), *appeal after remand*, 690 F.2d 869 (11th Cir. 1982) (profile includes walking slowly). Compare, *People v. Shandloff*, 215 Cal. Rptr. 916 (Ct. App. 1985) (being the first passenger to deplane) with *People v. Steckhan*, 116 Ill.App.3d 173, 452 N.E.2d 122 (Ct. App. 1983) (being the last passenger to deplane).

The situation in the Tenth Circuit is not entirely clear. In *United States v. McCranie*, 703 F.2d 1213 (10th Cir.), *cert. denied*, 464 U.S. 992 (1983) that court gave lipservice to *Reid* when it ruled that drug profile characteristics would not in themselves support a seizure. The court decided, however, that when combined with a criminal record there was sufficient evidence to sustain the detention. *But see, State v. Shy*, 373 So.2d 145 (La. 1979) (criminal record adds nothing to profile). Just one year after *McCranie*, in *United States v. Williams*, 726 F.2d 661 (10th Cir.), *cert. denied*, 104 S. Ct. 3523 (1984) the court held that profile factors, including nervousness, purchasing a one-way ticket with cash, denying knowing an individual with whom seconds before he had engaged in conversation, and flying from a drug source city, were sufficient to support a finding of reasonable suspicion to detain the defendant. These opinions are in conflict with the vast majority of federal court decisions on this question.

Not unlike the federal courts, numerous state courts have also ruled that a drug courier profile does not create reasonable suspicion to detain a suspect. *See e.g., Jacobson v. State*, 476 So.2d 1282 (Fla. 1985); *Wilson v. Superior Court of Los Angeles County*, 34 Cal. 3d 777, 670 P.2d 325, 195 Cal. Rptr. 671 (1983), *cert. denied, California v. Wilson*, 104 S. Ct. 1929 (1984); *People v. Steckhan*, 116 Ill.App.3d 173, 452 N.E.2d 122 (Ct. App. 1983); *State v. Rodriguez*, 32 Wash.App. 758, 650 P.2d 225 (1982); *State v. Cooke*, 54 N.C.App. 33, 282 S.E.2d 800 (Ct.App. 1981), *aff'd*, 306 N.C. 132, 291 S.E.2d 618 (1982); *State v. Casey*, 296 S.E.2d 473 (N.C.App. 1982); *State v. Shy*, 373 So.2d 145 (La. 1979). Each of these cases held that the various factors of

a drug courier profile did not provide reasonable suspicion to detain a suspect.

The effect of this decision is far-reaching. It gives police officers in New Mexico unrestrained discretion to stop virtually anyone on the highways of New Mexico, even though this Court and most federal and state courts have ruled that these detentions are in violation of the fourth amendment. If this case is permitted to stand, the list, or more accurately lists, of vague and varying characteristics commonly known as a "drug courier profile" will have been elevated to an amorphous standard that reduces the requirement of reasonable suspicion to a mere formality, thus denying to all who enter New Mexico the protections guaranteed by the fourth amendment.

As Judge Martinez aptly commented at the suppression hearing: "I'm Mexican; I have an accent; I drive on a New Mexico license and everybody knows we have a lot of drugs going through here. Is that enough?" Record, T. 1, 2-21-84, 281-82. It is not. This decision, which is in conflict with decisions of this Court and of state and federal courts throughout this country, should be reversed.

II. Whether The New Mexico Supreme Court Erred When It Decided, In Conflict With Florida v. Royer, 460 U.S. 491 (1983), And Other Controlling Precedents Of This Court, That A Finding Of A Voluntary Consent To Search Obtained During An Unlawful Detention Made It Unnecessary To Determine If The Resulting Search Was A Fruit Of The Unlawful Detention

The decision below is in direct conflict with the numerous precedents from this Court that require the sup-

pression of evidence obtained as a result of an unlawful detention. Totally ignoring this requirement of the fourth amendment, the New Mexico Supreme Court ruled that:

> *a voluntary consent can validate what might otherwise be an illegal search and seizure.* . . . The validation of the search hinges on the voluntariness of the consent. Cohen's state of mind and the procedure of the police in advising him of his rights are factors considered in assessing the voluntariness of the consent. *Thus, the consent form alone could validate the search that followed.*

App. at 29 (S. Ct.) (Citations omitted) (Emphasis added).[11]

The reasoning of the court below squarely rejects this Court's long-standing fourth amendment jurisprudence. This Court has long held that "[e]vidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion. The question to be resolved when it is claimed that evidence subsequently obtained is 'tainted' or is 'fruit' of a prior illegality is whether the challenged evidence was 'come by at exploitation of that illegality or instead by means *sufficiently distinguishable* to be purged of the primary taint.' " *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (emphasis in original). Thus, the finding of voluntariness is merely a threshold

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[11] The New Mexico Court of Appeals has decided another case involving the identical question presented here. *Santiesteban v. New Mexico*, No. 8207, slip op. (Ct. App. Oct. 10, 1985), *cert. denied*, 24 N.M.B.Bull. 1325 (1985), *petition for cert. filed*, (U.S. Jan. 16, 1986) (No. 85-1210). Judge Donnelly, who wrote the dissent in the court of appeals decision in the instant case, wrote the majority opinion in *Santiesteban*. The New Mexico Supreme Court declined to grant certiorari in that case, and it is now before this Court on a petition for a writ of certiorari.

requirement for a fourth amendment analysis. *Taylor v. Alabama*, 457 U.S. 687, 690 (1982). Furthermore, *Miranda* warnings do not serve to attenuate the taint because the warnings themselves do nothing to "assure in every case that the Fourth Amendment violation has not been unduly exploited." *Brown v. Illinois*, 422 U.S. 590, 604 (1975). After finding voluntariness, a reviewing court must determine whether the taint of the illegality has been purged.

This Court has applied this analysis to a consent to search given during a period of unlawful detention. *Florida v. Royer*, 460 U.S. 491 (1983). In that case, this Court held that the defendant's consent to search was "tainted by the illegality [of the arrest without probable cause] and was ineffective to justify the search." *Id.* at 508. *Royer* relied on *Dunaway v. New York*, 442 U.S. 200 (1979) and *Brown v. Illinois*, 422 U.S. 590 (1975) for the proposition that "statements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will." 460 U.S. at 501. In *Royer*, the defendant was stopped at the airport, the officers took his airline ticket and identification and asked Royer to accompany them to a small room. In that room he consented to the search of his suitcase. It was this consent that this Court ruled was tainted because his removal to the office was an arrest that was not based upon probable cause.

An excellent analysis of the "lingering confusion between 'voluntariness' . . . and the 'causal connection' test established in *Brown*," can be found in *United States v.*

Robinson, 625 F.2d 1211, 1220 (5th Cir. 1980), *appeal after remand*, 690 F.2d 869 (11th Cir. 1982). In that case, after determining that the factors of a drug courier profile did not create a reasonable suspicion, the magistrate held that the investigatory stop violated the defendant's fourth amendment rights. The magistrate also found that the defendant voluntarily consented to a search after being warned that he did not have to consent. The Fifth Circuit remanded the case for consideration of whether the consent was the product of the illegal detention and held after remand that, "[t]he cocaine . . . must be suppressed as the tainted fruit of the illegal arrest unless Robinson's consent to the search in the airport office was both (1) voluntary, and (2) not the product of the illegal detention." *United States v. Robinson*, 690 F.2d 869, 877 (11th Cir. 1982).

The court below in holding that voluntariness was the only issue to be decided,[12] failed to conduct the proper inquiry to determine whether the search was the fruit of the unlawful detention. This Court has identified three factors to be considered when making this determination: (1) the temporal proximity of the arrest and the consent to search; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

The New Mexico Court of Appeals properly analyzed the taint in this case using the three factors required by this Court, App. at 11-14 (Ct. App.). The New Mexico

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[12] Although the New Mexico Supreme Court ruled that the detention was lawful, that court also held that voluntary signing of the consent to search form would validate an unlawful search. App. at 30 (S. Ct.).

Supreme Court, by reversing the New Mexico Court of Appeals, stands in blatant opposition to this long-standing precedent and has effectively held that the protections of the fourth amendment are not available in New Mexico to of all those who use the highways of New Mexico.

Unfortunately, the facts here are representative of the searches and seizures the police are conducting on the New Mexico highways. Three recent cases decided by the Tenth Circuit Court of Appeals all involved illegal searches that the police attempted to "cure" through voluntary consents to search the vehicles. *United States v. Gonzalez*, 763 F.2d 1127 (10th Cir. 1985); *United States v. Recalde*, 761 F.2d 1448 (10th Cir. 1985); *United States v. Uribe*, No. 84-1146, slip op. (10th Cir., June 17, 1985). In all three of these cases, the Tenth Circuit Court of Appeals found that the searches were tainted by arrests that were unlawful because not based upon probable cause. Both Gonzalez and Recalde signed consent to search forms as did the petitioners here, and Recalde was also given *Miranda* warnings prior to his consent to search. In each case the appellate court held that the trial court did not err in finding the consent for the search to be voluntary but the court "did not make its finding in light of the requirement that such consent be free from the taint of the illegal detention." *United States v. Uribe*, No. 84-1146, slip op. at 10; *See also, United States v. Recalde*, 761 F.2d at 1458; *United States v. Gonzalez*, 763 F.2d at 1133.[13]

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[13] It should be noted that although the officer in *Gonzalez* denied the existence of a profile, 763 F.2d at 1129, and the officer in *Recalde* claimed to have a "gut instinct", 761 F.2d at 1451, in reality these cases are not any different from the instant case. A profile adds up to nothing more than an "inchoate and unparticularized suspicion or hunch." *Reid v. Georgia*, 448 U.S. 438, 442 (1980).

Furthermore, in all three of these federal cases, the defendants were stopped by New Mexico State Police officers, as were the petitioners here. If the New Mexico Supreme Court decision in this case is allowed to stand, state police officers will bring their cases to state district attorneys rather than federal prosecutors because the New Mexico Supreme Court has given them *carte blanche* to conduct illegal searches and seizures. As long as the police read a defendant his *Miranda* rights and have a defendant sign a consent to search form, the New Mexico Supreme Court will validate an unlawful search. *Miranda* rights and a consent to search form cannot be exploited to circumvent such clear violations of the fourth amendment to the United States Constitution.

—o—

CONCLUSION

For the reasons stated above, petitioners' request for a writ of certiorari to review the decision below should be granted, and the decision should be reversed.

Respectfully submitted,

FREEDMAN, BOYD & DANIELS, P.A.

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Attorneys for Petitioners

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

NO. 7818

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs.

MIER COHEN and EREZ ATAVA,

Defendants-Appellees.

STIPULATION PURSUANT TO RULE 206
OF THE RULES OF APPELLATE
PROCEDURE FOR CRIMINAL CASES

The parties by stipulation direct that the letter dated April 11, 1984, to Nancy Hollander, Reber Boult, and Rhonda Backinoff, from Michael E. Martinez, District Judge, attached hereto, be filed and made a part of the record proper in this case and be transmitted to the appellate court.

FREEDMAN, BOYD &
DANIELS, P.A.

By: Nancy Hollander
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PAUL BARDACKE, Attorney General

By: Approved by Telephone 7/9/84
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(SEAL)

STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT

Michael E. Martinez
District Judge
Division One
505/641-7496

Post Office Box 488
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April 11, 1984

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Re: State vs. Mier Cohen and Erez Atava;
cause no. CR-37609

Dear Counsel:

Thank you for your patience and cooperation in this matter. I apologize for the delay in rendering this decision, but I felt compelled to thoroughly review the materials you graciously provided. Please be advised that I am granting the Motion to Suppress.

The factual statements given in each brief are fairly accurate. At our hearing on this matter I ruled that the stop of the Defendants for speeding was proper; that the further investigation into their identities, record, and possessory interests in the vehicle were proper; that the detention of the Defendants after the officer had completed his duties relative to the traffic stop constituted an il-

legal seizure; that the search of the Defendants' vehicle was made without a warrant, not incident to a lawful arrest, and not based on probable cause; and that the consent given by the Defendants to the search was voluntary. Much of the State's brief addressed the issue of consent to a search. I do not disagree with the authority cited, but the issue which I was interested in was the effect of the illegal detention or seizure on the subsequent search, assuming consent to have been given. Ms. Hollander is to be commended for the thorough analysis given to this issue.

The case cited by the State which most closely resembles the facts of the case at issue is U. S. vs. Troutman, 590 F.2d 604 (1979). Nevertheless, the case which I find controlling is Florida vs. Royer, 75 L Ed 2d 229. It is my opinion that this case mandates a suppression on the evidence obtained in the case at bar.

Its interesting to note that not a single case has found that once the criteria of the drug courier profile are met, probable cause is established. Its even more interesting that at present there is no case that finds the courier profile sufficient to even justify a Terry type stop. Suppression is indeed a drastic remedy, but time and time again courts have found it to be a necessary instrument in the protection of constitutionally guaranteed rights. Were there other adequate protections against abuse of these rights by the police, I am confident that suppression of evidence would not be resorted to. As distasteful as suppression might be to the courts and to society in general, the consequences which would result from not providing such a check on the police power would be even more distasteful, if not frightening.

Again thank you for your briefs, the materials presented, and for your patience. I am directing that Ms. Hollander prepare the appropriate order for approval and submission to this Court.

Sincerely,

/s/ Michael E. Martinez
District Judge

MEM:mr

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

NO. 37609—Criminal

STATE OF NEW MEXICO

Plaintiff,

-vs-

MIER COHEN and EREZ ATAVA,

Defendants.

ORDER

(Filed April 16, 1984)

THIS MATTER having come before the Court upon motion of the defendants and the Court having heard testimony, received exhibits, heard arguments of counsel, and being otherwise fully advised of the circumstances;

IT IS ORDERED that the motion to suppress evidence is granted;

IT IS FURTHER ORDERED that all items seized from the vehicle in which the defendants were riding, including, *inter alia,* the alleged cocaine and the spare tire in which it was found, are ordered suppressed;

IT IS FURTHER ORDERED that all other fruits of the illegal detention and search will be suppressed if and when there is a showing that any evidence is a fruit of this illegality.

/s/ Michael E. Martinez
DISTRICT COURT JUDGE

STATE OF NEW MEXICO

Plaintiff-Appellant,

versus

MIER COHEN and EREZ ATAVA,

Defendants-Appellees.

No. 7818 (filed March 5, 1985)

APPEAL FROM THE DISTRICT COURT OF
BERNALILLO COUNTY
MICHAEL E. MARTINEZ, Judge

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OPINION

WILLIAM R. HENDLEY, Judge.

The state appeals the trial court's order suppressing evidence. The issues concern detention and consent. Defendants raise an issue concerning the initial stop, claiming it was a pretext stop. Because of our disposition, it is not necessary for us to reach that issue.

We affirm.

Officer Summers of the New Mexico State Police was on radar patrol on I-40 near Albuquerque. A few weeks earlier, he had attended a seminar on narcotics smuggling on I-40, at which he learned that there was a drug courier profile, based on recent cases, made by the police. For I-40, the profile is made up of the following characteristics: (1) Florida license plates; (2) rental cars; (3) occupants, usually two, who appear to be foreigners, usually of Latin descent; and (4) very little luggage for a cross-country trip, with a destination of Los Angeles.

At 5:07 or 5:09 p.m., Summers clocked defendants' vehicle going sixty-one miles per hour in a fifty-five mile per hour zone. After the vehicle passed, he noticed the Florida plates and the fact that there were two males inside. He engaged his emergency equipment and pulled the car over. He noticed a sticker indicating the vehicle was rented. Although Summers said that there was not much luggage in the car, there were some new clothes and two suitcases. Summers received identification from the driver, Mier Cohen, and the passenger, Erez Atava, and the rental contract on the car. Based on the names, Summers believed that defendants were foreigners. The rent-

al contract indicated that the car was prepaid in cash and was en route from Florida to Los Angeles.

Summers took the papers and told the occupants that Cohen would be cited for speeding. He also told them that he wanted to run a check on the documents. Summers went back to his car. Some time passed, during which Summers saw defendants conversing and looking back at him. Cohen got out of the car and began walking back to the police vehicle. Summers got out and met him between the cars. Summers thought this was unusual because it was cold and windy outside. Cohen wanted to know whether he was being cited and whether it would go on his record. Summers described Cohen as more nervous than a normal person at this time. Summers told Cohen that it was cold outside, that he had not received a reply yet, and that he should go back to his vehicle.

After Summers went back to his vehicle, he decided to radio for assistance from the narcotics division. Then Summers received negative replies to his inquiries concerning the defendants' documentation and their vehicle. He waited for the assistance to arrive, during which time he prepared a consent to search form. When the assistance arrived, he explained the situation to the two other officers, Velarde and Marino.

The officers then approached defendants' car. Velarde approached Atava and took him back to the police vehicles. Summers and Marino approached Cohen, handed him the consent form, and asked him to get out of the vehicle. Cohen was read his Miranda rights and said he understood his Miranda rights. Cohen was asked if he would mind if the vehicle was searched. He said that the officers could search. Cohen signed the consent form.

Velarde testified that he told Cohen that Cohen did not have to consent to a search. For safety reasons, the vehicles were driven to a service station, where the search was performed.

The search revealed eleven pounds of cocaine in an extra spare tire in the trunk of the car. The tire was first observed at 5:40 or 5:45 p.m. Summers testified that approximately forty mintues elapsed between the stop and the seizure of the cocaine, and that defendants were not free to leave during this entire time. Summers could not remember how long it was between the negative reply to his National Crime Information Center (NCIC) inquiries and the arrival of the assisting officers. The state asserts it was fifteen to twenty minutes.

Detention

Two cases sculpt out some of the situations where the police may encounter citizens. *United States v. Berry*, 670 F.2d 583 (5th Cir.1982); *Wilson v. Superior Court of Los Angeles County*, 34 Cal.3d 777, 195 Cal.Rptr. 671, 670 P.2d 325 (1983), *cert. denied*, — U.S. —, 104 S.Ct. 1929, 80 L.Ed.2d 474 (1984). First, there are communications or encounters involving no coercion or detention; these do not involve the fourth amendment and the police need no justification whatsoever to do them. Second, there are brief seizures or detentions which are strictly limited in scope and duration; for these, the police need only a reasonable suspicion. Third, there are full-scale arrests; for these, probable cause is necessary.

A warrantless arrest must be supported by probable cause. *State v. Garcia*, 100 N.M. 120, 666 P.2d 1267 (Ct. App.1983). Probable cause exists when the facts and cir-

cumstances within the knowledge of the officers, based on reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. *State v. Snedeker*, 99 N.M. 286, 657 P.2d 613 (1982). It requires the officer to believe, and have good reason to believe, that the person he arrests has committed a felony. *State v. Jones*, 96 N.M. 14, 627 P.2d 409 (1981).

A police officer may, in appropriate circumstances, approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *State v. Galvan*, 90 N.M. 129, 560 P.2d 550 (Ct.App.1977). *See also Terry v. Ohio*, 392 U.S. 1 (1968). In such a case, the officer must have a reasonable suspicion that the law has been or is being violated. A reasonable suspicion means that the officer must be aware of specific articulable facts, together with the rational inferences therefrom. *State v. Galvan*. It is these facts and reasonable inferences that provide the basis for the suspicion. The facts available to the officer must convince a person of reasonable caution to believe that the action taken is appropriate.

In this case, the information the police had on these defendants was a perceived match between the elements of the police's drug courier profile and some characteristics exhibited by defendants, but little more. The "little more" was that Cohen was more nervous than the normal person. It should be noted that nervousness is part of some drug courier profiles. *See Florida v. Royer*, 460 U.S. 491 (1983); *Berry*. A drug courier profile is simply a series of characteristics that the police believe many drug smugglers meet. *Berry*. Most of the drug courier

profile cases have arisen in airports and the profile varies from airport to airport. What is clear from the cases is that the drug courier profile by itself will not provide probable cause to arrest. *United States v. McCaleb*, 552 F.2d 717 (6th Cir.1977). Whether or not it provides a reasonable suspicion depends on the other factors in the case because the drug courier profile describes a large category of innocent travelers. *See Reid v. Georgia*, 448 U.S. 438 (1980).

The state claims that the lower court was wrong when it said that "there is no case that finds the courier profile to even justify a Terry type [sic] stop." We disagree. The cases on which the state relies do not find that a match between the drug profile and certain characteristics of the defendant or his or her behavior is sufficient. Most of the cases cited by the state have one of two additional factors present. In one line of cases, the additional factor is that the defendants have lied to the police when initially questioned in a consensual encounter. *E.g. United States v. Jodoin*, 672 F.2d 232 (1st Cir.1982); *United States v. Vasquez*, 612 F.2d 1338 (2d Cir.1979); *United States v. Elmore*, 595 F.2d 1036 (5th Cir.1979), *cert. denied*, 447 U.S. 910 (1980). In another line, the additional factor is that the police checked the history of the defendant's ticket to know where he was going; if he was going to a source city, they contacted the police there and had the defendant followed; if the defendant went to an area of the city known for drug trafficking, that would be the additional factor. *See United States v. Post*, 607 F.2d 847 (9th Cir.1979).

Applying these rules to this case, once the officer received the negative reply to his NCIC inquiries, all he was

left with were the elements of the drug courier profile and nothing else. The few elements of the drug courier profile, by themselves, do not provide a reasonable suspicion. *See Berry; Galvan.* Under the facts here, after NCIC cleared defendants' papers, the police kept defendants' papers, two additional officers appeared and defendants were separated. This was not a continuation of the original stop for questioning and investigation. This was similar to the circumstances which were held to have the intrusiveness of an arrest in *Royer.* The detention, after clearance from NCIC was illegal.

Consent

The next question is whether the illegal detention tainted the consent. In order for a consent to eliminate any taint, there must be proof that consent was voluntary and that it was not the product of the illegal detention. *Berry.* The trial court found that the consent was voluntary but that it was tainted by the illegal detention. We agree.

In analyzing whether a confession is purged of the taint of an illegal arrest, courts require inquiry into the following factors: the temporal proximity between the arrest and the confession; the presence of intervening circumstances; and the purpose and flagrancy of the official misconduct. *Taylor v. Alabama*, 457 U.S. 687 (1982); *State v. Gilbert*, 98 N.M. 530, 650 P.2d 814 (1982). The courts use this analysis in fourth amendment cases, too. *E.g. Royer; Berry; Wilson; United States v. Robinson*, 690 F.2d 869 (11th Cir.1982).

The state does not argue that the taint was dissipated by using the three-factor analysis presented in *Gilbert.*

Rather, the state simply contends that a voluntary consent given in a non-coercive atmosphere overcomes the taint of any illegal detention. To the extent that *State v. Ruud*, 90 N.M. 647, 567 P.2d 496 (Ct.App.1977), may be read to say that a voluntary consent, without more, can validate a consent tainted by an illegal detention, it is not to be followed. *Ruud* found the consent to be involuntary. Accordingly, the issue of taintedness was not reached.

The state cites only *State v. Kennedy*, 290 Or. 493, 624 P.2d 99 (1981), as authority. *Kennedy* is distinguishable. In that case, the officers stopped defendant, saying they wanted to talk. Defendant asked about what. The officers said drugs. Defendant said that he was not carrying any and immediately offered to allow the police to search. In the present case, defendants were detained unlawfully for fifteen to twenty minutes, they were separated, and the officers requested Cohen's consent after asking him to leave the car and stand in the cold, while they read him his rights. *Kennedy* is not applicable authority in this situation.

The state's attempt to distinguish *Royer* by simply relating the facts of *Royer* is unpersuasive. This case is similar to *Royer*. Both cases involved an illegal detention; both involved a consent to search; both involved defendants who were moved around by the police prior to requesting the consent; both involved defendants who were not free to leave. There is no significant difference between this case and *Royer*.

In *Berry*, the court found that there were substantial intervening circumstances which served to attenuate the taint. These were that the two defendants were told that they did not need to consent, they were told that they could

contact an attorney and were offered a phone for this purpose, and they were permitted to consult with one another. In *United States v. Gooding*, 695 F.2d 78 (4th Cir. 1982), the court held that the taint was not vitiated because the illegal seizure and the consent all occurred in the same brief, continuous encounter. *Taylor v. Alabama* holds that a simple warning is insufficient to attenuate the taint and that there must be a "meaningful" intervening event. In *Robinson*, the advice that one could refuse consent was given well into the illegal detention and the consent was given in the immediate circumstances thereof. The taint was not purged.

The only intervening circumstances were that defendants received Miranda warnings and Velarde told Cohen that he did not have to consent to search. Under the circumstances of this case, these simple warnings are insufficient to cure the taint. *Taylor*. The reason is because the warning was given at a time when the police were otherwise exploiting the illegal detention. The request for consent occurred during the unlawful detention at a time when the officers retained possession of documents defendants needed to continue on their way. Also, the request for consent came after a substantial period of time in which defendants were kept waiting, not knowing what was transpiring. The request for consent occurred after defendants were separated and Cohen was made to step outside of his vehicle, into the cold. In short, the officers exploited the detention by placing Cohen in a position of vulnerability before they requested consent.

As for the flagrancy of the police misconduct, *Taylor* makes it clear that flagrancy does not necessarily refer to physical abuse or other outrageous conduct. It refers to

a deprivation of rights and the police's seizure of the opportunity presented by that deprivation to uncover evidence that they would not have uncovered lawfully. That is what happened here.

Affirmed.

IT IS SO ORDERED.

/s/ WILLIAM R. HENDLEY, Judge

I CONCUR:
/s/ PAMELA B. MINZNER, Judge
THOMAS A. DONNELLY, Chief Judge
(Dissenting)

DISSENT

THOMAS A. DONNELLY, Chief Judge.

I disagree with the majority decision holding that the consent to search defendant's vehicle was invalidated by an illegal detention of the defendants, and that the evidence seized by police officers following the search was subject to suppression.

The trial court found the initial stop, request for identification, and the National Crime Information Center (NCIC) check of defendants proper. Following the stop of the defendants, they were delayed somewhere between twenty and forty minutes while state police sought information concerning the car and the defendants from the NCIC. Prior to obtaining a written consent to the search from the defendants, the officers advised defendants both as to their Miranda rights and that they did not have to consent to a search of their vehicle. The officers then con-

ducted a search of the automobile and discovered eleven pounds of cocaine hidden in an extra spare tire in the trunk of the rental car.

In a letter written to counsel issued after a hearing on the motion to suppress, the trial court noted:

> [t]he factual statements given in each brief are fairly accurate. At our hearing on this matter, I ruled *that the stop of the Defendants for speeding was proper; that the further investigation into their identities, record, and possessory interests in the vehicle were proper;* that the detention of the Defendants after the officer had completed his duties relative to the traffic stop constituted an illegal seizure; that the search of the defendants' vehicle was made without a warrant, not incident to a lawful arrest, and not based on probable cause; *and that the consent given by the Defendants to the search was voluntary.* [Emphasis added.]

The officer who stopped defendants' vehicle sought an NCIC check on the car. After the NCIC information was received, defendants were detained approximately fifteen to twenty minutes longer. Although the trial court found the consent to be voluntary, he found that it was tainted by the illegal detention and that the evidence discovered in the ensuing search should be suppressed. The trial court did not find that the consent to search was coerced or forced from the defendant.

The trial court's finding that the consent was voluntary is in direct conflict with the lower court's determination that the search of the car was improper. Absent a determination that defendants' will was overborne or obtained improperly, the express consent of an accused to a search of his vehicle should validate the search. *Schneck-*

loth v. Bustamonte, 412 U.S. 218 (1973); *State v. Ruud*, 90 N.M. 647, 567 P.2d 496 (Ct.App.1977).

The finding by the trial court that the consent given by the defendants to the search of the automobile was "voluntary", should dictate reversal of the order suppressing the evidence entered herein. The issue as to the voluntariness of the search was the ultimate issue to be determined. The fact that the consent to search was given during the time defendants were detained does not as a matter of law invalidate the consent.

An accused may consent to a search by law enforcement officers and if the consent is genuine neither a search warrant nor probable cause is necessary. *State v. Aull*, 78 N.M. 607, 435 P.2d 437 (1967); *State v. Austin*, 91 N.M. 793, 581 P.2d 1288 (Ct.App.1978). *See also Parkhurst v. State*, 628 P.2d 1369 (Wyo.), *cert. denied*, 454 U.S. 899 (1981) (upholding validity of search of car trunk after defendants were stopped and consented to warrantless search). In *Schneckloth v. Bustamonte*, the United States Supreme Court stated that the prosecution must demonstrate that the consent to search was voluntarily given and was not the product of duress or coercion; that voluntariness is a "question of fact to be determined from the totality of all circumstances;" and that "while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." *See also United States v. Watson*, 423 U.S. 411 (1976); *State v. Ruud*.

The explanation for the ruling of the trial court as expressed in his letter to counsel appears to invalidate

a consent to search given while an accused is in custody. This is not the law in New Mexico. *State v. Herring*, 77 N.M. 232, 421 P.2d 767 (1966), *cert. denied*, 388 U.S. 923 (1967) (consent can validate an unlawful search). *See also State v. Austin.* As noted in the Annot. "Validity of Consent to Search Given by One in Custody of Officers," 9 A.L.R.3d 858, 873 (1966), "[m]any cases support the conclusion that a person may validly consent to a search even though the consent is given while he is in custody; that the fact of custody does not inherently render the consent invalid." A party can waive his rights under the Fourth Amendment and consent to a search provided that the consent represents a free and uncoerced decision. *State v. Ruud.* Voluntariness of consent to search is a fact question to be determined from the "totality of the circumstances" in each case. Whether or not defendant is under arrest or in custody is not the determinative issue as to the validity of a consent to search. *See United States v. Mendenhall*, 446 U.S. 544 (1980); *United States v. Prichard*, 645 F.2d 854 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981); *State v. McMahan*, 583 S.W.2d 540 (Mo.App. 1979); *State v. Angel*, 356 So.2d 986 (La. 1978).

The mere fact that a defendant is in custody does not alone render an accused's consent to search invalid. *State v. Lange*, 255 N.W.2d 59 (N.D. 1977) (upholding search of automobile after defendant was detained, taken to the police station and thereafter gave consent to search); *People v. Zynda*, 53 Ill.App.3d 794, 11 Ill.Dec. 471, 368 N.E. 2d 1079 (1977) (upholding validity of defendant's consent to a car search following his arrest); *State v. Angel*, (defendant's consent to search vehicle was affirmed despite determination that his detention was illegal where there

was no showing of coercion); *United States v. Allison*, 616 F.2d 779 (5th Cir.1980) (consent to search automobile held valid despite defendant's arrest); *United States v. Williams*, 647 F.2d 588 (5th Cir.1981) (consent of defendant to search personal effects held valid after defendant was detained because he met test of possible drug smuggler); *State v. Plas*, 80 Nev.251, 391 P.2d 867 (1964) (fact that defendant was in custody and detained for questioning did not negate validity of his consent to search vehicle). In *State v. Plas*, on appeal the court reversed the trial court's ruling that, because a defendant was held in custody the consent to search was invalid as a matter of law. In the instant case prior to the search of the automobile, the driver was read his Miranda rights and advised that he did not have to consent to the search.

It is not a prerequisite to uphold the validity of a consent to search without a warrant that a defendant first be accorded the rights set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). *State v. Ruud; State v. Carlson*, 83 N.M. 644, 495 P.2d 1091 (Ct.App.1972). Neither is a consent to search rendered involuntary by a failure to advise defendant of his right to refuse a request to search without a search warrant. *United States v. Shields*, 573 F.2d 18 (10th Cir.1978); *United States v. Agapito*, 620 F.2d 324 (2nd Cir.1980); *People v. Tremblay*, 77 A.D.2d 807, 430 N.Y.S.2d 757 (1980). In the present case defendants were advised of their Miranda rights and their right to refuse to give their consent to a search of their vehicle absent a search warrant. The trial court did not find that defendants' consent was given under coercive circumstances. The right to search an automobile is different from and broader than the right to search premises of a building, home

or office. *State v. Laughter*, 128 Ariz. 264, 625 P.2d 327 (App.1980) (defendant's consent to search car upheld despite fact officers handcuffed defendant and placed him under arrest).

To test the validity of a consent to search, the trial court must judge it against the totality of all the circumstances and the pivotal question is was the consent essentially a voluntary, free and unconstrained choice or was it the result of duress, coercion, implicit, or threat, express or implied, or of covert force. *Schneckloth v. Bustamonte; State v. Ruud.* The voluntary nature of a consent is a question of fact and not of law. *United States v. Tolias*, 548 F.2d 277 (9th Cir.1977); *United States v. Watson.*

Courts in other jurisdictions have consistently held that evidence obtained following the granting of a consent to search is not to be automatically suppressed as "fruit of the poisonous tree," but have instead stated that the evidence is to be suppressed only if the consent was gained by exploitation of illegal conduct or that defendant's free will was overcome so that the consent was not voluntary. *State v. Kennedy*, 290 Or. 493, 624 P.2d 99 (1981). *See also* 2 W. LaFave, *Search and Seizure*, § 8.1 at 611 (1978).

I would reverse the trial court's order of suppression and remand the cause to the trial court for a determination of the issues presented in the motion to suppress under the totality of the circumstances test set forth in *Schneckloth v. Bustamonte* and *State v. Ruud.*

/s/ THOMAS A. DONNELLY,
Chief Judge

From The New Mexico Supreme Court

STATE OF NEW MEXICO,
Petitioner,

versus

MIER COHEN and EREZ ATAVA,
Respondents.

No. 15818 (filed December 9, 1985)

ORIGINAL PROCEEDING ON CERTIORARI
MICHAEL E. MARTINEZ, District Judge

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Attorneys for Respondents

OPINION

WILLIAM RIORDAN, Justice.

Defendants Mier Cohen (Cohen) and Erez Atava (Atava) were indicted for possession of cocaine and trafficking of a controlled substance. Cohen was also charged with speeding. After a hearing on a motion to suppress evidence, the trial court found that the stop of the defendants' automobile was proper; that the consent to search was voluntary; but that the detention of Cohen and Atava before the consent was obtained was an "illegal seizure" and, therefore, the consent was invalid as a matter of law.

The State appealed to the Court of Appeals, raising the issue of the reasonableness of the detention as well as the question of voluntariness as a matter of law, considering the totality of the circumstances.

The Court of Appeals affirmed the trial court. We granted certiorari and reverse the Court of Appeals and trial court, and reinstate the case on the trial docket.

FACTS.

On January 5, 1984, Summers (Summers) of the New Mexico State Police stopped a Pontiac automobile for speeding sixty-one miles per hour in a fifty-five mile-per-hour zone. The automobile was driven by Cohen and occupied by a passenger, Atava. Officer Summers decided to give Cohen a ticket for speeding. Summers became concerned by other facts he observed. He noticed the automobile was an out-of-state rental car that had been paid for by cash and was a one-way rental from Florida to California. The car did not contain much luggage for a cross-country trip; both the occupants appeared to be foreigners and both appeared to Summers to be more concerned about the stop than was ordinarily encountered for stops of this kind. While Summers was in his car writing up the speeding ticket and waiting for a response on his request to the National Crime Information Computer (NCIC),[1] Cohen got out of his automobile and walked back toward the state police car. Summers got out of his car and met Cohen between the automobiles. Cohen told Summers that he was in a hurry and would like Summers to issue his ticket so he could leave. Summers testified that Cohen appeared nervous and anxious and, that with the temperature about twenty-five degrees on a cold and windy day, it seemed

very unusual that Cohen would get out to talk to the officer.

Summers considered the facts he had observed in conjunction with information he had recently received in a state police course concerning common factors in narcotics trafficking cases in New Mexico ("profile factors"). These "profile" factors were: (1) two persons appearing to be foreigners, (2) driving a rental car with Florida license plates, (3) across the country, (4) with a small amount of luggage, (5) and with a one-way car rental being paid for in cash.

Based on his observations, Summers decided that he had a reasonable suspicion to investigate further. He called for assistance from other state police officers and shortly thereafter, Officer Marino (Marino) and Sergeant Velarde (Velarde) (the officers in charge of narcotics) responded. While waiting for the additional officers, Summers filled out a consent to search form in anticipation of requesting permission from Cohen to search the automobile. The NCIC response was received and Summers was informed that there were no warrants outstanding for Cohen and that the car was not reported as stolen. A few minutes later,[2] the other officers arrived and were briefed by Summers.

After the other officers arrived, both Cohen and Atava were asked to get out of the car. Cohen was advised of his Miranda rights. Velarde also told him that they would like to search his car for weapons and narcotics. Cohen was presented with the consent to search form. Cohen "read the form", consented to the search and signed the form. No threats were made to obtain the consent.[3]

Because it was cold and getting dark, and because there was heavy traffic on the highway, the officers decided to drive the car to the closest, warm, well-lit area to conduct the search. Cohen was instructed to follow one patrol car and the other police car (with Atava as a passenger) followed Cohen to a service station three miles away. The car was driven inside and the search was conducted. During the search the officers noticed an extra tire in the trunk. Its bolt pattern was different than that of the rental car (which had its spare tire in place) and it was flat. When Marino picked it up, he noticed there was something "loose" inside. The tire was broken down and eleven pounds of cocaine were found inside.

The issue is whether the detention of Cohen and Atava for a short time after Summers received a negative response from his NCIC inquiry voids the consent as a matter of law.[4]

REASONABLENESS OF DETENTION.

Summers testified that he stopped the car at 5:09 p.m. The initial stop of Cohen and Atava was proper.[5] He requested an NCIC check on the defendants and the car. Within five minutes, Cohen exited the car and approached Summers' patrol unit. After a conversation with Cohen, Summers decided to "pursue the investigation further." He testified that it was ten to fifteen minutes after stopping. It was at least 5:19 p.m. He requested assistance from Marino who was at police headquarters. It took Marino three to four minutes to arrive at the location where the defendants were stopped. During this period, Summers received a reply from his NCIC inquiry that must have been between 5:19 p.m. and 5:24 p.m. Marino

and Velarde arrived and were briefed. Cohen was presented with a consent to search form which he signed after being advised that he did not have to consent to a search. After a brief examination of the items in the car, the officers decided that since it was getting dark and there was a lot of traffic they would move the car to search it. Cohen was directed to follow the police unit to a service station three miles away which Summers testified was the closest, warm, well-lit area.

After the search was commenced the tire was observed "about 5:25" or "5:35" at the service station.[6] The cocaine was found after the tire was taken apart ten minutes later. The period of time that could have elapsed according to the testimony from the time that the NCIC check came back negative until the consent form was signed is between three minutes and thirteen minutes (5:19 until 5:22, if the tire was located at 5:25 as it took "three or four minutes to drive to the service station," or 5:19 until 5:32, if the tire was located at 5:35).

The issue then becomes whether the detention of Cohen and Atava for a few minutes while the officer asked for and obtained a consent to search form was unreasonable in light of the facts that Summers had observed.[7] We hold that it was not.

A recent case on the issue of what is a reasonable detention is *United States v. Sharpe*, — U.S. —, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985).[8] The Court in *Sharpe* pointed out that only unreasonable searches and seizures are prohibited by the Constitution. However, investigatory stops of vehicles are subject to the limits of the fourth amendment also. In discussing the reasonableness of a stop, (which is analagous to a detention once the reason for a

valid stop expires, as did here when the NCIC report came back negative) the Court quoted from *Terry v. Ohio*, 392 U.S. 1, 20 (1968) the following test: "[W]hether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Sharpe*, — U.S. at —, 105 S.Ct. at 1573, 84 L.Ed.2d at 613.

This is the test of "reasonableness" that was used in analyzing the officers' conduct in *Sharpe*.[9] In determining the purpose of a stop, the court must consider the law enforcement purposes being served as well as the time reasonably needed to effectuate their purposes, *United States v. Hensley*, — U.S. —, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985), and if the purpose underlying an investigative stop or detention (that of investigating possible criminal activity) is to be met, the police must, under certain circumstances, be able to detain the individual. *See Michigan v. Summers*, 452 U.S. 692 (1981).

The Court in *Sharpe* stated:

> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.

United States v. Sharpe, — U.S. at —, 105 S.Ct. at 1575, 84 L.Ed.2d at 615-616.

In the instant case, Summers detained Cohen and Atava only for a few minutes after he received the negative report from NCIC and wrote out the speeding ticket. Considering the information that he relied upon, (i.e.,

there were two men in the car with out-of-state plates; they appeared to be foreigners; they were on a cross-country trip in a one-way car rental paid for by cash from an area suspected by authorities to be a point of origin in drug shipments; that they appeared more nervous than the average person stopped for speeding; that they appeared to want to get away from the officer as quickly as possible) and in conjunction with the number of these factors that the officer had been told previously were common in cases involving recent drug arrests in New Mexico, this detention was based on reasonable suspicion.

Cohen and Atava argue that the consent would have been proper if obtained prior to the NCIC check being completed, but the few minutes that they were detained after the NCIC check was completed, until the narcotics officers arrived, made the arrest illegal. However, common sense and ordinary human experience must govern over rigid criteria. *Sharpe.* Creative judges engaged in *post hoc* evaluations of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. *Id.* We do not believe the fourth amendment as interpreted by the United States Supreme Court requires such absurd results.

While this case was pending the Tenth Circuit Court of Appeals decided two similar cases: *United States v. Recalde,* 761 F.2d 1448 (10th Cir.1985) and *United States v. Uribe,* No. 84-1146 (D.N.M. filed June 17, 1985).[10] Both cases involve consent searches in which the consent was obtained after defendants had been properly stopped. In both cases the court reversed the conviction and suppressed the evidence seized during a search of defendant's automobile.

Recalde is distinguishable from the current facts in that the arresting police officer was acting on more than "gut instinct" in detaining Cohen. In *Recalde*, the officer originally stopped Recalde for speeding, then issued a citation and conducted a NCIC check on the status of Recalde's car. The car was registered to another person, whom Recalde did not know how to contact. An assisting police officer was then called. The NCIC response was negative. Recalde gave the officers verbal permission to search the trunk of his car. Nothing unusual was found. The arresting officers instructed Recalde to follow them to the police station.[11] Inside the station, Recalde was given Miranda warnings and was asked to sign a consent to search form, which he did. Recalde testified that he did not read English well and the officer did not read it to him. The prosecution conceded that the search of Recalde's car at the police station was not based on probable cause or judicial warrant. They relied entirely on the consent form Recalde signed at the station. However, the court stated that the extended detention and movement prior to obtaining the consent to search could not be justified. The court held that the reasonableness of the detention and investigation ended after the first fruitless search. In continuing the detention after nothing was found, all subsequent investigation, including the signed consent form, became tainted. That is not the case with Cohen and Atava, who fit the drug courier profile and appeared unusually nervous. An officer must be aware of these specific articulable facts, together with rational inferences from those facts to provide the basis for suspicion. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). The facts and inferences are to be judged by an

objective standard, i.e., would the facts available to the officer warrant the officer as a person of reasonable caution to believe the action taken was appropriate? *State v. Hilliard*, 81 N.M. 407, 409, 467 P.2d 733, 735 (Ct.App. 1970). Unsupported intuition is insufficient. *United States v. Mallides*, 473 F.2d 859, 862 (9th Cir.1973). Therefore, the issue here is whether the facts known to the police constituted reasonable suspicion to detain defendants for any period of time. The reasonableness of the detention rests on the balancing of competing interests: "[T]he nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Recalde*, 761 F.2d at 1454 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

The court in *Sharpe* held that the test for whether the length of a *Terry* stop met the fourth amendment reasonableness requirement was whether the police investigated "in a diligent and reasonable manner" that is "likely to confirm or dispel their suspicions quickly." In light of the short amount of time Cohen and Atava were detained, a few minutes, the governmental interest of stopping drug trafficking is justified. Summers was completing the consent form for Cohen to sign while assisting officers were enroute. He was investigating in a diligent and reasonable manner. Thus, we hold there was no unreasonable detention.

VALIDITY OF CONSENT.

Defendants were asked to get out of the car. Atava was taken back to the police car. They were separately administered their Miranda rights. Both stated they under-

stood their rights. Cohen was presented with the consent to search form and was told that the officers would like to search his car for weapons and narcotics. He was advised that he did not have to sign the form.[12] Cohen agreed to the search, read the form and then signed it. For safety reasons, the automobile was moved to a nearby gas station. These facts, as well as the lack of any claim that the consent was involuntary, distinguish this case from that of *Recalde*. The consent was voluntary and upon the three-tiered analysis in *Recalde* it was, first, unequivocal and specific as stated in the consent form signed by Cohen. Second, consent was given without duress or coercion. Cohen was informed that he did not have to sign the form. In addition, Cohen was given his Miranda rights and stated he understood them. Third, there is a presumption against waiver of constitutional rights. The facts appear as though the prosecution has met its burden of establishing both the absence of any duress or coercion and the specific and unequivocal nature of the consent. Voluntariness is a question of fact to be determined from the totality of the circumstances. *Recalde*, 761 F.2d at 1457. The court in *Recalde* found the consent tainted by the illegal detention. That is not the case here. We have determined that the detention was legal. In addition, New Mexico follows the rule that a voluntary consent can validate what might otherwise be an illegal search and seizure. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *State v. Ruud*, 90 N.M. 647, 567 P.2d 496 (Ct.App.1977). The validation of the search hinges on the voluntariness of the consent. Cohen's state of mind and the procedure of the police in advising him of his rights are factors considered in assessing the voluntariness of the consent. Thus, the consent form alone could validate the search that followed.

The second decision from the Tenth Circuit Court of Appeals is *United States v. Uribe*, in which Uribe was stopped in a routine traffic roadblock for checking driver's license and vehicle registration. The car Uribe was driving was registered to someone else. Uribe did not know how to contact the owner. Uribe twice orally consented to allow officers to search the trunk. During the second search the officers noticed a "sweet odor" consistent with that of cocaine or deodorants used to mask the odor of cocaine. Upon a third inspection of the trunk and also of the rear seat area, a "white powdery substance" was found. One officer left for five or six minutes to obtain a field test kit. The powdery substance was negative for the presence of narcotics. Uribe was further questioned and then asked to accompany officers to the police station one and one-half miles in a nearby city. Oral consent was again given to search the vehicle. Officers then found several plastic packages containing cocaine. Uribe signed a waiver of rights one hour and forty minutes after the initial stop. The Court found that there was no probable cause to detain or arrest Uribe and there was no consent to go to the police station; thus, there was not sufficient attenuation between the unlawful seizure of Uribe and the consent to search.

The facts in *Uribe* are different from this case. In *Uribe*, the officers repeatedly searched Uribe's trunk. They had no probable cause, as their efforts turned up nothing until after the move to the police station. In this case, Cohen signed the consent form first, then the officers pursued the search diligently. An attempt was made to search the trunk, but because of darkness, traffic and cold the effort was moved to the closest place available, a near-

by gas station. The movement of the car is distinguishable in that it was for safety, light and warmth to a nearby service station not to the police station as in *Uribe* and *Recalde*. The procedure the officers followed in this case was done in a manner that would have quickly confirmed or dispelled their suspicions. *Sharpe*, — U.S. at —, 105 S.Ct. at 1575, 84 L.Ed.2d at 615-616. There was no unreasonable delay.

United States v. Gonzalez, 763 F.2d 1127 (10th Cir. 1985) is another case similar to *Uribe* in that the police officer noticed the odor of a deodorizer that is often used to mask the odor of narcotics. The officer took Gonzalez to the police station where a speeding citation was issued and a consent to search form signed. Gonzalez was originally detained for speeding and was moved to investigate ownership of the car. No drug courier profile was used. Based on the officers' intuition, the car was searched. The court found the length of the stop unreasonable[13] and there was insufficient attenuation between the illegal detention and the consent to search. *Gonzalez* is more similar to *Uribe* than the facts of this case. Here, we have more than just *intuition*, the consent form was signed *before* the movement of the car, and the car was *not* taken to the police station but to a nearby gas station.

In light of the above factual distinctions and the length and reasonableness of the detention of defendants, we do not believe that the search and seizure in this case was unreasonable. The officer's action was justified at its inception and the means of investigation were appropriate and diligently pursued. The consent to search form was signed voluntarily, thus validating the evidence found. We

reverse the trial court and the Court of Appeals and reinstate the case on the trial docket.

IT IS SO ORDERED.

/s/ William Riordan, Justice

WE CONCUR:

/s/ William Federici, Chief Justice

/s/ Harry E. Stowers, Justice

/s/ Mary C. Walters, Justice

Dan Sosa, Jr., Senior Justice dissenting and adopting Court of Appeals' opinion as his dissent.

FOOTNOTES

1. The standard procedure was to make a request of the National Crime Information Computer as to whether the person stopped was wanted or the car stopped was reported stolen.

2. The record does not contain the exact time involved, but the car was stopped at 5:09 p.m. and the defendants were placed under arrest after the cocaine was seized, about fifty minutes later.

3. Summers and Marino testified at the motion hearing. Neither Cohen nor Atava testified.

4. No cross-appeal was taken and the evidence introduced at the suppression hearing supports the trial court's finding in this regard.

5. The consent was attacked not on the basis of being coerced or uninformed, but rather being voluntarily but illegally obtained by virtue of the detention.

6. Marino testified that the tire was found at "about 5:25". Summers testified that the tire was first observed at "about 5:35".

7. We assume for the sake of discussion that the officers need grounds such as reasonable suspicion to ask for consent to search.

8. The Court of Appeals opinion in this case was filed on March 5, 1985, some fifteen days prior to *Sharpe*.

9. The detention in *Sharpe* was approximately twenty minutes.

10. *United States v. Uribe* is an unpublished order and judgment from the United States Court of Appeals for the Tenth Circuit.

11. Recalde was a resident alien from Argentina. He gave undisputed testimony that his upbringing and experiences in Argentine had instilled in him an acquiescence to police authority. He testified that he did not feel free to leave under these circumstances and felt that the police officer was not through with him. Recalde was never told he was free to go. The officer testified that Recalde was free to leave, but the vehicle would have been detained for suspected transport of illegal narcotics. Recalde was traveling alone on an interstate highway, five miles from the nearest town. The Court concluded that "Recalde was not, by any objective standard, free to go." *United States v. Recalde*, 761 F.2d at 1459.

12. We do not hold that either an advice of rights or advice that a person does not have to consent to a search is required when obtaining a consent to search, but we merely recite the facts from this case.

13. Gonzalez claimed that the officer detained him for approximately twenty minutes

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Friday, December 27, 1985

NO. 15,818

STATE OF NEW MEXICO,

Petitioner,

vs.

MIER COHEN and EREZ ATAVA,

Respondents.

This cause having heretofore been submitted and taken under advisement, and on December 9, 1985, an Opinion having been handed down and Judgment entered reversing the judgment of the trial court and the decision of the Court of Appeals and reinstating the case on the trial docket, and no motion for rehearing having been filed;

NOW, THEREFORE, IT IS ORDERED that the Judgment entered herein on December 9, 1985 is hereby made final.

IT IS FURTHER ORDERED that the Record in Cause No. 7818 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete

Clerk of the Supreme Court
of the State of New Mexico